Supreme Court, U.S.
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NO. 92-5579

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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SUPREME COURT, U.S.

WILBURN DOBBS,

Petitioner,

v.

WALTER D. ZANT,
WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner had failed to show that there was a constitutionally unacceptable level of risk that racial prejudice influenced the sentencing decision?

II.

Did the Eleventh Circuit Court of Appeals and the District Court properly decline to include a transcript when there has been no hearing to determine why the transcript was not included in the lower courts and why Petitioner failed to take the action that he took to discover the transcript at an earlier date?

III.

Did the Eleventh Circuit Court of Appeals properly decline to reconsider an allegation of ineffective assistance of counsel based upon the law of the case?

IV.

Is Petitioner's allegation relating to the sentencing phase instructions barred by the law of the case doctrine, or in the alternative, did the instructions properly inform the jury that they had discretion in determining punishment once an aggravating factor was found?

V.

Should this Court decline to consider an issue not raised below, that is, whether the court should review the issue of whether jurors must consider mitigating circumstances or whether it is sufficient that they not be prohibited from considering mitigating circumstances?

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OCTOBER TERM, 1992

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF
OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Wilburn Dobbs, was tried beginning on May 20, 1974, in the Superior Court of Walker County, Georgia, on two counts of aggravated assault, two counts of armed robbery and one count of murder. All of these charges arose out of one incident at a convenience store in December, 1973. On May 22, 1974, Petitioner was found guilty on all five counts.

Petitioner received a ten year consecutive sentence for each of the aggravated assault convictions, life imprisonment for each of the armed robbery convictions and was sentenced to the death penalty for the murder conviction.

Petitioner appealed the convictions and sentences to the Supreme Court of Georgia. That court affirmed the convictions and sentences. Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976). The Supreme Court of the United States subsequently denied a petition for a writ of certiorari. Dobbs v. Georgia, 430 U.S. 975 (1977).

Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia, on July 17, 1977. After an evidentiary hearing was held, the petition was denied on October 9, 1979. An application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on February 20, 1980.

A petition for a writ of certiorari was denied by the Supreme Court of the United States on June 16, 1980, and a subsequent petition for rehearing was denied on August 11, 1980.

During the time that the case had been pending in the state habeas corpus court, Petitioner filed an extraordinary motion for a new trial in the Superior Court of Walker County on June 11, 1979. An evidentiary hearing was conducted on August 12, 1979. The motion was denied by the Superior Court on August

13, 1979. The Supreme Court of Georgia affirmed the denial of the extraordinary motion for new trial. Dobbs v. State, 245 Ga. 208, 264 S.E.2d 18 (1980). A petition for a writ of certiorari was denied by the Supreme Court of the United States on April 21, 1980.

Petitioner filed the instant petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, Rome Division, on December 3, 1980. An evidentiary hearing was held before the Magistrate on October 6, 1982. Both parties filed objections to various portions of that report and recommendation. On January 13, 1984, the district court entered an order denying habeas corpus relief as to the convictions but granting relief as to the death sentence. The district court did not rule on certain sentencing issues. Petitioner and Respondent both appealed.

The Eleventh Circuit Court of Appeals affirmed the district court as to the conviction but reversed the district court's decision on sentence, ruled the issue was without merit and remanded for consideration of the remaining issues. Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986). A second opinion was issued on rehearing in Dobbs v. Kemp, 809 F.2d 750 (11th Cir. 1987), elaborating on two issues.

Petitioner then filed a petition for a writ of certiorari which was denied on May 18, 1987. Rehearing was denied on June 22, 1987. Dobbs v. Kemp, 481 U.S. 1059 (1987).

The parties proceeded to take depositions including the eleven surviving trial jurors, the trial judge and trial counsel, as well as Petitioner's expert. On August 7, 1989, the district court denied relief on all of the issues which were the basis of the remand. Dobbs v. Zant, 790 F.Supp. 1566 (N.D. Ga. 1989).

On August 21, 1989, the Petitioner filed a motion to alter, amend and reconsider the judgment or, in the alternative, for relief from judgment. Petitioner subsequently obtained an order for additional time to file a supplement to that motion. On September 7, 1989, a conference was held with the court regarding the transcribing of the arguments of the sentencing phase. No order was entered by the court and the court declined to enter an order directing the court reporter to turn over the tapes from the trial. The court subsequently entered an order deferring ruling on the motion to alter or amend allowing Petitioner through October 12, 1989, to search for the tapes and to report back to the court.

Although not reflected in the record, the court reporter voluntarily allowed counsel to search for the stenotapes and provided full access on or about October 11, 1989. The court reporter observed that at least a portion of the sentencing phase arguments had been reported, contrary to what he had

earlier told Respondent's counsel. The court reporter agreed to transcribe the arguments that existed and completed that transcript on October 16, 1989.

After several more extensions, Petitioner finally filed "procedural" pleadings on December 4, 1989, including a motion to expand the record to include the transcripts of the sentencing phase arguments, a motion to amend the petition and a motion to reopen and reconsider certain issues decided before the original appeal to the Eleventh Circuit. A hearing was held on the procedural issues on February 2, 1990. By way of letter dated February 20, 1990, the Petitioner suggested the district court hold the proceedings in abeyance to allow Petitioner to return to the state court to exhaust an issue based on the sentencing phase argument. Petitioner has yet to pursue any such state proceeding.

Finally, on February 26, 1990, Petitioner filed the supplement to the motion to alter or amend. On March 6, 1990, the district court entered an order denying all of Petitioner's motions.

Petitioner filed a notice of appeal on April 4, 1990. The district court granted a certificate of probable cause to appeal on April 6, 1990.

The Eleventh Circuit affirmed the decision of the district court on October 25, 1991. On November 22, 1991, Petitioner

filed a petition for rehearing and suggestion of rehearing en banc. On June 4, 1992, the court issued a corrected opinion and denied rehearing.

Petitioner has now filed the instant petition seeking review of the decision of the Eleventh Circuit Court of Appeals.

PART TWO

STATEMENT OF FACTS

The facts in the instant case were set forth by the Supreme Court of Georgia on direct appeal, as follows:

> Early on the morning of December 14, 1973, appellant Wilburn Wiley Dobbs asked Walter Lee Harris and Charles Burke if they wanted to commit a robbery. Appellant said he needed money so the three of them drove in appellant's 1967 blue Chevrolet to a grocery store and gas station owned by Roy L. Sizemore. They looked around the store and left but thereafter returned to the store in different coats. Appellant told Harris to go inside the store and ask Mr. Sizemore for a gas can. While Burke stayed in front of the gas station, appellant took his sawed-off shotgun and went around to the back of the store. Mr. Sizemore went outside to show Burke where the gas can was, and when he did appellant darted inside the store.

Sixty-two-year-old Grace Foster was in the store shopping for groceries and appellant pointed the shotgun at her. When Mr. Sizemore re-entered the store, appellant covered him with the shotgun while Harris searched Mr. Sizemore and took his wallet. Mr. Sizemore told the robbers that he had heart trouble and that they could have anything they wanted but begged them not to shoot him or hurt Mrs. Foster.

Appellant shoved Mr. Sizemore to the back of the room, made him lie down and hit him two times on the back of the head with the butt of the shotgun. When Mrs. Foster tried to run to Mr. Sizemore's side, appellant pointed the shotgun at her, threatened to shoot her and told her to keep her mouth shut. Although Mrs. Foster begged appellant to spare Mr. Sizemore, Appellant turned to Mr. Sizemore, who was lying helpless

on the floor, and fired a shotgun blast into his stomach. This wound caused Mr. Sizemore's death. William Austin, a route salesman for Mayfield Dairy Farms, entered the store to make a delivery and appellant fired his shotgun at him.

While Harris was taking the money from Mr. Sizemore's cash register, appellant hit Mrs. Foster in the back of the head with the butt of his shotgun and knocked her unconscious. Appellant, or one of his companions, then placed his foot on Mrs. Foster's hand and tore her pocketbook out of her grasp. Mrs. Foster had a skull fracture above the eye, a brain concussion, cuts on her forehead and scalp, bruises, and scratches as a result of this beating. Her eyelids were swollen, both of her eyes were black and ten stitches were required to close one of her cuts.

> After appellant and his companions left the store with $210 taken by them, Mr. Austin (the route salesman) went to Mr. Sizemore and tried to find a pulse but Mr. Sizemore was dead at that time from the shotgun blast.

Dobbs v. State, 236 Ga. 427-8.

The record additionally shows that Petitioner testified at trial and stated that he was not with Harris and Burke when the robbery was committed. He asserted that he was visiting with various people on December 14, 1973. Petitioner did admit going to Paul Young's car lot. Petitioner was approached by certain officers at that time and voluntarily accompanied the officers to Walker County jail. Petitioner also gave the officers permission to search his car. A brown tobacco sack and a pocket knife were found in the car, which were identified by Grace Foster at trial as having been taken from her at Sizemore's store. Petitioner was arrested finally on December 18, 1973. Petitioner also gave a detective permission to get the shotgun used in the robbery from his home during part of the questioning. Furthermore, Grace Foster and William Austin positively identified the Petitioner at trial as the triggerman at the store.

Further facts will be developed as necessary to examine the issues presented by the instant petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THERE IS NO BASIS FOR THIS COURT'S GRANTING OF CERTIORARI AS THE ELEVENTH CIRCUIT COURT OF APPEALS APPLIED THE APPROPRIATE EIGHTH AMENDMENT TEST IN CONCLUDING THAT PETITIONER HAD NOT DEMONSTRATED A CONSTITUTIONALLY UNACCEPTABLE RISK THAT RACIAL PREJUDICE AFFECTED HIS SENTENCING.

Petitioner first asserts that this Court should grant the instant petition for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals regarding his allegation of racial prejudice at his sentencing. In the district court and in the Eleventh Circuit Court of Appeals Petitioner raised both Fourteenth Amendment equal protection and Eighth Amendment cruel and unusual punishment claims. In this Court, Petitioner relies solely on the Eighth Amendment allegation. The basis for Petitioner's assertion that certiorari should be granted is his conclusion that the Eleventh Circuit Court of Appeals improperly held that the Petitioner was required to prove that racial prejudice actually affected the decision of the jurors. Respondent submits that

the Eleventh Circuit Court of Appeals properly applied the correct Eighth Amendment standard in reviewing Petitioner's allegations.

Respondent would initially note that the primary basis for Petitioner's offer of proof in the district court consisted of the depositions of the trial jurors and the testimony of an individual purporting to be an expert basing his opinions upon those depositions. Respondent has at all times opposed the taking of the depositions of the trial jurors and would continue to oppose the utilization of those depositions under Rule 606 of the Federal Rules of Evidence.

In the Eleventh Circuit, Petitioner acknowledged "the record may not prove that the decision makers acted with bad purpose." (Petitioner's Brief at 10 n. 4). The most Petitioner has ever asserted is that based on the background of the jurors, racial attitudes might have had some effect on their decisions. Each juror specifically denied that race had any effect on the outcome of this case, but insisted that the outcome was based solely on the heinous nature of the crime committed and the Petitioner's demeanor.

In McCleskey v. Kemp, 481 U.S. 279 (1987), the Court addressed the Eighth Amendment challenge based on alleged racial discrimination. Although the Court in McCleskey was dealing solely with a statistical challenge to the death penalty, its analysis in the Eighth Amendment context is

relevant here. The Court noted in that case that no one contended that the studies presented could prove that race entered into a capital sentencing decision or that race actually was a factor in the particular case. The Court acknowledged, "there is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials." Id. at 309. The Court went on to hold, "where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." Id. at 313.

Petitioner specifically challenges the decision of the district court and circuit court and the standard utilized by those courts. Petitioner cites to the decision of this Court in Turner v. Murray, 476 U.S. 28 (1986). The plurality opinion in that case did discuss the question of whether certain factors would create an unacceptable risk that the death penalty may have been imposed arbitrarily or capriciously. The plurality also found, however, that the risk in that case was unacceptable "in light of the ease with which that risk could have been minimized." Id. at 36. The Court was focusing on the question of whether the trial judge should have been required to allow questions during voir dire about racial attitudes of the jurors. Under the circumstances of that particular case, and the fact that the case involved the death

penalty, the Court concluded that the defense was entitled to ask the questions. Although the language in Turner might be of assistance in the instant case, the legal situations are entirely different as what is being considered here is not a prophylactic rule but the ultimate decision of the trial jury. Therefore, the lower court's reliance on the decision in McCleskey was appropriate.

Furthermore, the district court fully examined all factors in deciding this issue. In fact, in the order of March 6, 1990, subsequent to Petitioner's motion to alter or amend or reopen and motion for reconsideration, the Court specifically examined Petitioner's assertion that the Court failed to apply the appropriate standard and held, "Dobbs must show an unacceptable risk that race may have affected the sentencing decision." (R9-135-8) The Court went on to conclude that the question was a subjective one of "whether the particular decision makers in his case harbored prejudices that created an unacceptable
risk. . . ." (R9-135-9).

Similarly, the Eleventh Circuit held that to prove in this case "that the risk of racial prejudice influencing sentencing rose to constitutionally unacceptable levels, Dobbs must show that racial prejudice actually affected the jury's decision." The court went on to hold that Petitioner "has failed to demonstrate that a constitutionally unacceptable risk existed that racial prejudice affected his sentencing." Dobbs v. Zant.

Respondent submits the lower court properly applied a subjective standard. Although the district court did find that certain jurors had racial prejudices, the district court did not find that those prejudices had an impact on the death sentence in Petitioner's case and in fact found that the risk of such did not rise to a constitutional level. The district court specifically found as a matter of fact that Petitioner had failed to show that any racial prejudice influenced the jury's verdict.

In reviewing Petitioner's allegations, it is important to note that Petitioner focuses on brief excerpts from the depositions of the eleven trial jurors that were surviving at the time of the remand, ten of whom were white and one black. Petitioner fails to focus on extensive other testimony provided in these depositions which was cited by the district court and which is pertinent to the district court's resolution of the issue presented. Although it is undisputed that the population in Walker County, Georgia, consisted of only approximately four percent blacks and that the Petitioner is black and the victim was white, this alone in the context of this case did not create a constitutionally unacceptable risk that race would be a factor in the sentencing decision of the jury. Again, Petitioner's reliance on Turner v. Murray is misplaced as that was dealing with a prophylactic requirement upon the trial court and not with the final sentencing decision of the jury.

What can be seen from the depositions of the white trial jurors is that their backgrounds were consistent with the backgrounds of most people growing up during this particular time frame in that they all went to segregated schools and segregated churches and as a general rule most did not socialize with black people while they were growing up. To draw any kind of inference of racial discrimination or prejudice particularly of a constitutionally significant magnitude from this type of background would be to eliminate the overwhelming majority of the population of the state as eligible jurors, judges, defense attorneys, or district attorneys in all cases in which a black defendant and a white victim are involved.

Although many jurors testified that they did not socialize with blacks, a review of the entire deposition will show that most of these jurors did not socialize either inside or outside the home except on rare occasions. They all grew up in small communities with not much opportunity to socialize. Although several jurors expressed concerns about family members marrying blacks, several jurors stated that they did not have particular concerns or that their concerns were based on concerns for the children of such a marriage. Every juror disagreed with the principles of hatred espoused by the Klan and most jurors did not even know anyone who had been a member of the Klan.

Several jurors had worked with blacks over the years. As noted by the district court, "none of the jurors viewed blacks as more violence prone than whites, or as morally inferior to whites." Dobbs, 720 F.Supp. at 1576. Only two jurors expressed a fear of blacks. "To varying degrees, all the jurors said that their opinion of a black person depends on the qualities of the individual and/or that skin color does not determine those qualities." Id. Mr. Marsh, the one black juror, did not even voice particular concerns about discrimination over the years nor about discrimination in this case.

As observed by the Eleventh Circuit, "although certain of the juror's statements revealed racial prejudice, no juror stated that he or she viewed blacks as more prone to violence than white, or as morally inferior to whites and their comments do not reveal otherwise."

Respondent submits that what can be seen from these depositions is simply that these jurors had much in common with many people in Georgia during the time frame in which they grew up. The fact that they may have grown up with a particular environment or have some generalized attitudes does not support any inference as to the basis for their opinion in this particular case. In fact, all jurors who were asked stated that race had absolutely no effect on their decision as to the death sentence and that the facts of the case were what

justified the death sentence. Under these circumstances, Respondent submits that the Petitioner has simply not established an Eighth Amendment violation.

Petitioner also focuses on the depositions of the trial attorney and the trial judge and attempts to assert that their attitudes somehow rendered the sentence in this case an Eighth Amendment violation. Respondent submits that the attitudes of the trial attorney and the trial judge are not relevant to a consideration of the basis for the decisionmakers' imposing a death sentence. The judge, as did the jurors and the remainder of the people in Walker County who grew up in the same time period, grew up in a segregated community with limited contact with black people. Petitioner also attempts to make much of the trial judge's votes in the General Assembly years prior to his serving as a judge in this case which certainly are not relevant to his attitude at the time of the trial in this case. Furthermore, Petitioner would characterize virtually every member of the General Assembly who served during the same time as did Judge Coker as a racist or at least one operating with an overpowering racial prejudice, rather than recognizing that the time Judge Coker served in the General Assembly was almost twenty years prior to the trial of the instant case. Even if it could be said that the votes of Judge Coker during the time he was in the General Assembly reflected his personal attitudes during that time frame, it certainly cannot be said

that they in any way reflect his attitudes twenty years later. Petitioner has shown no conduct on the part of Judge Coker either prior to or during the trial of this case which indicated any bias against the Petitioner or any bias against blacks, certainly not any which would have affected the way he handled the trial of this case or would have affected the outcome of this case in any fashion. Respondent submits that Petitioner simply has failed to establish a basis for an Eighth Amendment violation or any showing that there was any risk that Judge Coker's views on race had any effect on the sentence.

Petitioner's assertions concerning trial counsel also do not serve as a basis for an Eighth Amendment violation. As noted by the district court, this would be a challenge to the effectiveness of trial counsel, not an Eighth Amendment claim. Such a Sixth Amendment claim is, of course, unexhausted. Petitioner has not asserted anything specific that counsel could have or should have done that would have actually affected the outcome of the proceeding. Petitioner has yet to show any racial bias on the part of any of the jurors which would have resulted in their disqualification prior to trial nor has he established any actual racial prejudice that impacted on this case that counsel could have eliminated. Further, as noted by the Eleventh Circuit, "Dobbs' lawyer did not express his personal views at Dobbs' trial and neither the

lawyer nor the trial judge decided Dobbs' penalty. . . .[i]t cannot be said that the trial judge's or the defense lawyer's racial attitudes affected the juror's sentencing determination." Dobbs v. Zant.

Respondent submits that a review of all of the above clearly establishes that Petitioner failed to carry his burden of proving an Eighth Amendment violation based on the death sentence in this case. Further, the lower courts applied the correct legal analysis. Certainly, there is always a possibility that racial prejudice might have an influence in any given case, but the mere possibility is insufficient to establish a constitutional violation. All Petitioner has done is to make gross generalizations from the statements made by trial jurors to attempt to convince this Court to make some overriding inference of discrimination by the imposition of the death sentence in this case or a conclusion of an unacceptable risk that racial prejudice affected the sentence.

Thus, there is no basis for this Court's granting certiorari on this issue.

II. THE DISTRICT COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY DECLINED TO EXPAND THE RECORD TO INCLUDE A TRANSCRIPT OF THE SENTENCING PHASE ARGUMENTS AND PROPERLY DECLINED TO RECONSIDER THE ALLEGATION OF INEFFECTIVE ASSISTANCE AT SENTENCING BASED UPON THE LAW OF THE CASE DOCTRINE.

Petitioner next asserts that the district court and the Eleventh Circuit Court of Appeals erred in refusing to expand the record to include the transcript of the sentencing phase arguments. It should be noted that Petitioner consistently refers to this transcript as a transcript of the entire sentencing phase. Actually, this is incorrect. There was no evidentiary presentation at the sentencing phase; however, the court's initial charge to the jury, the tendering of any documents and the court's concluding charge to the jury were submitted and were before the Eleventh Circuit Court of Appeals in its first review. The only additional portion of the transcript that was obtained pertaining to the sentencing phase consists of the closing arguments of the defense and the state consisting of a total of twelve pages.

As set forth in the initial procedural history, this transcript was a subject of litigation in the district court after final judgment was entered. Contrary to all of Petitioner's assertions, there has never been any finding of bad faith, misconduct or intentional misleading on the part of any party nor has there ever been any finding by any court which would justify Petitioner's accusations of affirmative misleading by the Respondent. (Petition at p. 34). All that the record reveals is that Respondent submitted an affidavit from the court reporter over ten years ago indicating that the court reporter stated he had not transcribed the sentencing phase arguments and an affidavit from the trial judge indicating that he did not believe that the closing arguments at the sentencing phase were transcribed. Contrary to Petitioner's assertions, there was no court order from the district court that in any way related to Petitioner's obtaining these transcripts or conducting any search of the court reporter's office. Rather, the district court specifically told the Petitioner that no such order would be entered and Petitioner was told to inquire of the court reporter. Upon request, the court reporter voluntarily agreed to allow counsel for Petitioner to conduct their own search of the stenotapes in storage. All of this, obviously, is not a matter of record as there has never been any evidentiary development on the obtaining of the transcript or the failure

to have obtained the transcript, nor has there ever been any reason offered by the Petitioner as to why he decided to make this inquiry at the late stage of the proceedings that he did and why he could not have made the same inquiry earlier. The whole point of Respondent's opposition to Petitioner's motion to expand the record in the district court was that there necessarily needed to be evidentiary development on this question and that the state habeas corpus court had not had the opportunity to review this particular transcript in making its assessment. The district court thus properly declined to allow the record to be expanded to consider a transcript which had not have been presented to the state appellate or state habeas corpus court for review.

Petitioner again sought to expand the record and asked the Eleventh Circuit Court of Appeals to remand the case to require the transcript to be submitted. The Eleventh Circuit Court of Appeals declined to do so. In spite of that ruling, and contrary to the rules of the Eleventh Circuit Court of Appeals, Petitioner then simply attached the transcript to his record excerpts to that case, as he has attached that transcript as an appendix to this Court. That transcript is not a part of the record and has never been made a part of the record by any court and the contents of that transcript are not properly before this Court for its consideration.

All the district court and the Eleventh Circuit Court of Appeals have done is require the Petitioner to present this evidence to the state courts first. Petitioner's argument that this is not in keeping with the court's concerns of finality are misplaced and are particularly ironic when Petitioner is seeking to have this Court relitigate issues previously decided prior to the Eleventh Circuit Court of Appeals' remand. In fact, the decision by this Court in Keeney v. Tamyo-Reyes, ___ U.S.___ , 112 S.Ct. 1715 (1992), supports Respondent's position. In that case, this Court held that a Petitioner must show cause and prejudice before he would be allowed to present evidence to the federal courts which was not presented to the state courts. Petitioner has never made such a showing and there has never been any finding by any court on this particular issue. It would be particularly inappropriate for an appellate court to try to make some assessment based upon the bare allegations of the Petitioner and the limited amount of evidence in this record as to the appropriateness of considering this transcript and particularly to try to resolve any allegations of bad faith or improper conduct on the part of the Respondent.

Additionally, Petitoiner has consistently referred to matters which have not been proven and are not a matter of evidence in any court including Petitioner's assertions that he has constantly sought the trial transcript. This is a matter which was not developed in any evidentiary fashion in the

district court and the most the record reflects is that in 1981 Petitioner asked that the record be supplemented with the closing argument of the district attorney at the sentencing phase. To the best Respondent can determine, Petitioner's motion to expand the record originally filed in the district court did not refer to the argument of trial counsel. The record does not reflect the Petitioner did anything after 1981 to attempt to either reconstruct the transcript which is allowable under the provisions of Georgia law or to simply examine the court reporter's notes as he did in the instant case, until after the district court denied relief in its entirety in 1989.

The most that the record shows is that for some reason after final judgment was entered by the district court, Petitoiner embarked on a fishing expedition to try to have the district court reconsider its judgment. Petitioner had numerous opportunities throughout the years to utilize an available state procedure to attempt to reconstruct this portion of the transcript, see, O.C.G.A. § 5-6-41, and certainly could have attempted to do so at the time when the memories of all parties were fresh, prior to the time that the district attorney who tried the case died and could have sought information from all those present.

Petitioner also asserts that exhaustion is not an issue in relation to this transcript. Petitioner does not mention to this Court that Petitioner sought to raise in the district court a substantive issue challenging the prosecutor's closing argument at the sentencing phase which he does not raise here. The district court specifically ruled that that issue would be unexhausted and that to allow the document in support of that issue would render the petition a mixed petition under Rose v. Lundy, 455 U.S. 209 (1989). The district court then went on to conclude that Petitioner should present any allegations based on the closing arguments at the sentencing phase in the state court first and that would allow the state court to make a factual inquiry to determine the process by which the trial was transcribed. Petitioner has yet to seek to file a state habeas corpus petition attempting to exhaust any allegation relating to the prosecutor's closing argument and he has not sought to present a state petition including the transcript of the sentencing phase arguments.

Petitioner has not shown that the district court abused its discretion in declining to reopen the record after final judgment was rendered and has not shown any abuse of discretion on the Eleventh Circuit Court of Appeals in declining to expand the record. Therefore, there was no issue for the Eleventh Circuit Court of Appeals or the district court to reconsider in relation to the ineffective assistance of counsel claim and the

law of the case clearly barred review based upon the record as it existed in both courts. As noted by the Eleventh Circuit Court of Appeals, the original opinion of that court considered the allegation of ineffective assistance during the sentencing phase of the trial. Dobbs v. Zant, 790 F.2d at 1513-14. The only issue before this Court for review is the Eleventh Circuit's conclusion that it was bound by that decision under the law of the case doctrine. The substantive allegation of ineffective assistance of counsel is not before this Court for review. The most this Court should review is the question of whether the Eleventh Circuit erred in applying the law of the case doctrine. As there has been no showing of abuse of discretion in refusing to include a transcript when there has been no evidentiary development on the discovery of that transcript, there was nothing for the Eleventh Circuit Court of Appeals to reconsider in relation to the allegation of ineffective assistance of counsel and the prior decision should remain the law of the case. Therefore, this allegation presents no basis for the granting of certiorari.

III. PETITIONER'S ALLEGATION RELATING TO THE CHARGE ON MITIGATING CIRCUMSTANCES IS BARRED FROM REVIEW UNDER THE LAW OF THE CASE DOCTRINE OR WAS PROPERLY FOUND TO BE WITHOUT MERIT.

Petitioner next challenges the lower courts' conclusions that the charge on mitigating circumstances and on the discretion of the jury was constitutionally sufficient. Respondent has at all times asserted that this allegation is barred from review based upon the law of the case doctrine. Respondent also has asserted that Petitioner raised additional challenges to the sentencing phase instruction subsequent to the remand to the Eleventh Circuit Court of Appeals and any such arguments were not properly before either the district court or the Eleventh Circuit Court of Appeals.

The original panel opinion of the Eleventh Circuit Court of Appeals considered the charge on mitigating circumstances in great detail. Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986). On appeal after the remand, the Respondent submitted that the original decision was binding as the law of the case and that Petitioner has shown absolutely no basis for relitigating the allegations that had been addressed on the first appeal.

Furthermore, Respondent submitted that Petitioner's allegations also were without merit. As the Eleventh Circuit Court of Appeals applied the appropriate legal standard in reviewing these claims, there is no basis for the granting of certiorari in this case. The Eleventh Circuit Court of Appeals properly found that the charge as a whole informed the jury of its role in imposing the death penalty and "it is clear that it sufficiently informed the jury on the requirement of finding statutory aggravating circumstances and the requirement for considering mitigating circumstances. (Footnote omitted). The particular instructions to which Dobbs objects, when read in context, simply inform the jury that once it finds an aggravating factor, it has wide discretion to determine the punishment." Dobbs v. Zant.

In fact, the district court considered the charge in its entirety and noted the following:

> The judge was informing the jury that once an aggravating factor is found, the jury has wide discretion to determine the proper punishment. Given that the judge instructed the jury properly on the role of aggravating and mitigating circumstances, that Dobbs

> was not prevented from presenting anything in mitigation, and that the proceedings were bifurcated, the court rejects Dobbs' comparison of his case to the situation of Furman v. Georgia, 408 U.S. 238 (1972).

(District Court's Order on Reconsideration at 7).

Respondent submits that the district court and the Eleventh Circuit Court of Appeals properly considered the charge as a whole as required under Cupp v. Naughten, 414 U.S. 141 (1973), and found no constitutional error. To the extent Petitioner makes additional allegations, Petitioner misinterprets the charge of the court and the law of the State of Georgia as the jury in the State of Georgia does have unlimited discretion to determine whether to impose a life sentence, that is, whether they will find mercy, once a statutory aggravating circumstance has been found.

Respondent thus submits that this allegationspresents no basis for the granting of a petition for a writ of certiorari.

IV. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW AN ISSUE NOT PRESENTED TO THE COURT BELOW.

Petitioner finally asserts that this Court should grant certiorari to determine and clarify under what circumstances a jury must consider mitigating circumstances or whether the charge is sufficient if the jury is not prohibited from considering mitigating circumstances. Respondent has reviewed Petitioner's brief to the Eleventh Circuit Court of Appeals and Petitioner's reply brief and has found no allegation of this nature in either brief. Petitioner raised various allegations pertaining to the particular charge in this case and whether it adequately guided the jury's discretion and adequately explained mitigating circumstances. Petitioner at no time asked the Eleventh Circuit Court of Appeals to make the legal analysis requested of this Court.

It is well settled that certiorari will not be granted where the federal constitutional issue is raised for the first time before this Court. See, Moore v. Illinois, 408 U.S. 786, 799 (1972); Cardinale v. Louisiana, 394 U.S. 437, 438-9 (1969).

Under the circumstances of this case, Respondent submits that as the issue was not presented below, there is no basis for this Court's granting certiorari to review this claim.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, Respondent prays that this Court deny the petition for a writ of certiorari filed on behalf of Wilburn Dobbs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

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This 28th day of September, 1992.

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